Filed 4/25/06 In re Sarah M. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re SARAH M. et al., Persons Coming Under the Juvenile Court Law.	B186485 (Los Angeles County Super. Ct. No. BK00808)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ALBERTO M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn Kading Martinez, Commissioner. Affirmed in part and reversed in part.

Lisa A. DiGrazia, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Liana Serobian, Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Alberto M. appeals from an order declaring his two minor daughters, 16-year-old Sarah M. and 14-year-old Alison M., to be dependent children of the court under subdivisions (a), (b) and (j) of Welfare and Institutions Code section 300,[1] and ordering that he have no visitation with his daughters pending further order of the court. He challenges certain of the jurisdictional findings and the no visitation order. We agree that the challenged jurisdictional findings are not supported by the evidence and reverse them. We affirm the remainder of the order, including the no visitation order.

FACTUAL AND PROCEDURAL BACKGROUND

On July 14, 2005, the Department of Children and Family Services (DCFS) filed a section 300 petition alleging that Sarah and Alison were at risk of serious physical harm due to physical abuse by appellant (subd. (a)); that appellant was unable to care for the girls due to the physical abuse, his use of illicit drugs, and a prior intervention by the juvenile court (subd. (b))[2]; and that each girl was at risk for abuse due to appellant's abuse of her sibling (subd. (j)).

According to the detention report, on the evening of July 11, 2005, San Pedro police received a 911 call from someone who observed appellant hit Sarah with his hands, remove his belt and hit her several times with the belt, then drag her by the hair into his car. An investigating officer was told that appellant also hit Alison with his belt and dragged her into his car. The officers located Sarah in Moorpark at the home of a paternal aunt, Natalie C. Alison was with a paternal aunt, Annette M., in San Pedro.

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[1] All further section references are to the Welfare and Institutions Code.

[2] The petition also alleged that the girls' mother, Stacey C., was unable to care for them due to drug abuse. Her whereabouts were unknown, she did not have custody of the girls at the time the petition was filed, and she is not a party to this appeal.

In a police interview, Sarah denied that appellant hit her with a belt but stated that appellant hit Alison with a belt. Sarah said she got into appellant's car after he punched her repeatedly about the body. Police observed marks near Sarah's left eye. Alison denied that appellant hit her with a belt during the incident but claimed he had hit her with a belt two days earlier. Police observed bruises on her legs.

The Children's Social Worker (CSW) interviewed Sarah and Alison. Sarah stated that she and Alison had been living with Annette M. for the past five months, although their maternal aunt, Kimberly C., who lived in San Bernardino, was their legal guardian. Appellant maintained telephone contact with their aunts to check up on the girls.

On the evening of July 8, Sarah left Annette M.'s home. She and her cousin Rebecca spent the weekend with various friends. She did not tell her aunt or other family members where she was. When appellant found out she had been gone for a few days, he located her at a friend's home in San Pedro. Sarah and Alison[3] went outside, where appellant was waiting for them. He was screaming at them. He took off his belt and tried to hit them with it, but missed. They got into his car, at which time appellant began punching them.

Alison told the CSW that appellant did not hit her on July 11. He did hit her with a belt on July 9, after she spent the night at a friend's home and did not come back as scheduled.

The CSW was unable to contact appellant but interviewed Annette M. and Kimberly C. Annette stated that appellant screamed at the girls and made demeaning statements to them, was a frequent drug user and had an extensive criminal history. Kimberly said she had been raising Sarah and Annette since 2002, when appellant left them with her. She reported physical abuse of the girls by appellant, describing him as very volatile. She also stated that he had a criminal history, possibly involving murder.

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[3] Sarah did not tell the CSW when Alison joined her.

The CSW was unable to find any documents showing that Kimberly C. was the girls' legal guardian. The CSW detained the girls and placed them in foster care.

After a detention hearing, at which the juvenile court found a prima facie case for detention, DCFS filed a first amended petition. This added, under subdivision (b) of section 300, allegations of emotional abuse by yelling at the girls and calling them names. It also added allegations as to appellant's criminal history, including convictions for assault, possession of a controlled substance, driving with a suspended license, possession of a loaded firearm, corporal injury on a spouse and murder.

For the August 9, 2005 jurisdiction/disposition report, the CSW interviewed Sarah, who stated that appellant sometimes abused her physically, hitting her on the legs with his hand or a belt. As to the July 11 incident, she explained that she left home on Friday with her cousin because she was mad at appellant; she did not like his girlfriend and was mad that he was still with her. She did not go home that weekend or tell appellant where she was. At some point Alison joined her. Then appellant came to get them. Once they got in his car, appellant began hitting her on the legs with his belt. He yelled at her, telling her that she was just like her mother. He tried to hit Alison but could not reach her. Sarah added, "My dad has done this before. He has a bad temper."

Alison stated that appellant "[u]sually just yells, but he got really mad." She also said that when he hit her with the belt, it "didn't hurt that bad. It's the yelling that is worse."

Appellant told the CSW that Sarah and Alison had been spending time in the projects in San Pedro, with questionable people. He was concerned for his daughters' safety. As to the July 11 incident, he explained, "Sarah took off on Friday. She went to the projects." He found out that she was in a bad part of San Pedro with an 18-year-old boy. When appellant went to get her, she began kicking and scratching him. He took off his belt and hit her with it in order to get her into the car. He acknowledged he knew he should not have "spanked her but she got combative." He denied using excessive force on the girls. He acknowledged yelling at the girls but denied calling them names.

When asked about the allegation of appellant's drug use, both girls stated that appellant did not drink alcohol or use drugs. Appellant denied any drug use and stated that he drinks alcohol infrequently.

Appellant did not want to discuss his criminal convictions, other than acknowledging the domestic violence conviction was for hitting his wife after learning that she had cheated on him. Kimberly C. told the CSW that the murder conviction resulted from an incident in which appellant was defending his brother, who was being beaten by a gang member. Kimberly added that appellant was a "kind, loving and caring man," but that he needed to learn anger management and new techniques for disciplining the girls.

The CSW stated that she attempted to provide appellant with referrals for parenting classes, domestic violence/anger management programs and counseling on July 29. He refused to take them, stating that he did not need to participate in a parenting program. He said that he did not know that hitting the girls with a belt was considered child abuse. He would refrain from physical discipline in the future.

Since Sarah and Alison had been detained, Alison had talked on the telephone to appellant, but Sarah had refused to talk to him. The foster mother reported that appellant had yelled at her on the telephone. When the girls were taken to the DCFS office for visitation on July 28, Sarah appeared to be afraid of appellant and refused to visit with him. Appellant saw the girls in the waiting area and told them to go into the visitation room. The CSW told appellant that the visit was not going to begin immediately and the girls needed to wait in the waiting area. Appellant again told the girls to go into the visitation room. The CSW told appellant he needed to sit down and wait for the monitor before visitation could begin. At that point, he complied.

On August 9, the juvenile court ordered Sarah and Alison placed with Annette M. Although appellant did not want the girls placed with her, Sarah and Alison wanted to be placed there. It ordered that appellant have monitored visitation with Alison. Appellant agreed that he would have no visitation with Sarah pending further order of the court.

On September 16, Annette M. reported to the CSW an incident involving appellant. He "pushed around" his nephews when they would not go to the hospital to visit their father. She confronted appellant about this and an altercation ensued. Annette received a "fat lip." When the CSW saw Annette, three days after the altercation, she saw no evidence of a swollen lip.

At the jurisdictional/dispositional hearing on September 19, Sarah testified as to the July 11 incident. She stated that appellant had hit her with the belt a lot of times in the past. When he came to get her on July 11, she was scared of him. He yelled at her that she was just like her mother and that she was nothing. In the past, he had yelled at her and Alison that they were going to be nothing when they got older. Sarah loved appellant but did not want to live with him.

Alison testified in chambers. She did not want to see appellant. It would make her scared and nervous if she had to testify in front of him, and she "probably wouldn't want to say everything." Alison explained that on Friday, she went with her cousin Eric to a friend's house and spent the night. She thought that Sarah was going to tell appellant that she spent the night with her friend Mary, but Sarah did not do so. When Alison came home on Saturday, appellant was upset that she did not tell him she was spending the night with a friend, and he hit her. Alison ran away to her friend Lily's house. On Monday, she went to another friend's house, and she saw Sarah there. When appellant found them there, he tried to get them into the car. They did not want to go with him and resisted, so he started hitting them. He hit Sarah with his fist and a belt. He hit Alison with an open hand, but once they got into the car, appellant started hitting her with a belt. Alison stated that appellant had hit her with a belt many times in the past.

The juvenile court sustained the petition under subdivisions (a), (b) and (j) of section 300, based on appellant's physical and emotional abuse of the girls and on his criminal history. The court found that appellant physically abused Sarah and Alison when he hit them with his hands and with a belt. Appellant was "unable to control his anger and his conduct." While the girls may have misbehaved, "[m]isconduct by

teenagers does not give a parent license to beat them up." Appellant additionally abused them emotionally by telling them they were like their mother and were nothing.

The court also found it "contrary to the girls' best interest to have any contact with their father." Even though they loved appellant, they had been degraded by him and feared him. They needed time to heal and to see that appellant was committed to making changes in the way he parented them. It therefore ordered that there be no visitation.[4]

The court ordered that appellant complete a program for parenting teenagers. It ordered that he participate in group counseling for anger management and that he obtain individual counseling.

DISCUSSION

Visitation

Under section 362.1, subdivision (a): "In order to maintain ties between the parent or guardian and . . . the child, and to provide information relevant to deciding if, and when, to return a child to the custody of his or her parent or guardian . . . , any order placing a child in foster care, and ordering reunification services, shall provide as follows: [¶] (1)(A) Subject to subparagraph (B), for visitation between the parent or guardian and the child. Visitation shall be as frequent as possible, consistent with the well-being of the child." Subparagraph (B) provides that "[n]o visitation order shall jeopardize the safety of the child. To protect the safety of the child, the court may keep the child's address confidential. . . ."

Appellant contends that the juvenile court abused its discretion in denying him visitation with Sarah and Alison, in that there was no substantial evidence that visitation would jeopardize the girls' safety. Respondent takes no position on this issue.

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[4] The court indicated a willingness to modify its no visitation order upon the filing of a section 388 petition. We take judicial notice of the fact that on January 25, 2006, the court ordered that Sarah and Alison be allowed monitored visitation with appellant.

We review the court's order for abuse of discretion. (*In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 465.) Discretion is abused if the court's order is unsupported by substantial evidence. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 581.)

Under section 362.1, subdivision (a), a juvenile court may deny visitation only upon a showing of detriment to the child if visitation were to be ordered. (*In re Mark L.*, *supra*, 94 Cal.App.4th at p. 580.) Detriment includes harm to the child's emotional well-being. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008.) In determining whether to order visitation or whether visitation would be detrimental, the court may consider the child's wishes. (*In re S.H.* (2003) 111 Cal.App.4th 310, 317.)

The evidence showed that appellant had abused Sarah and Alison physically and emotionally, with the emotional abuse taking a worse toll on the girls than the physical abuse. Although the girls loved appellant, they were afraid of him. Sarah did not want to visit with appellant prior to the jurisdictional/dispositional hearing. By the time of the hearing, the girls' counsel represented that Alison did not want visitation with him either. The girls were not yet in therapy. Appellant had refused referrals for parenting classes, domestic violence/anger management programs, stating that he did not need to participate in a parenting program. He admitted yelling at the girls but denied calling them names, and he said nothing to indicate recognition that his words could constitute emotional abuse.

It is reasonably inferable from the foregoing evidence that it would be harmful to the girls' emotional well-being if they were forced to visit with appellant before they were given an opportunity to heal and to deal with the abuse they had suffered. This is sufficient detriment to deny visitation. (*In re Mark L.*, *supra*, 94 Cal.App.4th at p. 581; *In re Christopher H.*, *supra*, 50 Cal.App.4th at p. 1008.) Appellant's interest in reunification with the girls could not be promoted at the girls' expense. (*In re S.H.*, *supra*, 111 Cal.App.4th at p. 317.)

Moreover, the juvenile court made it clear at the hearing that it considered the no visitation order temporary. It virtually invited the parties to file a section 388 petition to modify the order if any change of circumstances made modification appropriate. (See,

e.g., *In re Heather A.* (1996) 52 Cal.App.4th 183, 196, fn. 12 ["positive steps taken by Father after he was denied custody appear to have fostered the girls' desire to resume living with him"].) Its subsequent order permitting visitation establishes its willingness to modify the order at the appropriate time. We thus find no abuse of discretion in the order.

Jurisdictional Findings

Appellant challenges the juvenile court's jurisdictional findings based on emotional abuse and appellant's criminal record. Respondent agrees, as do we, that there is no substantial evidence supporting the finding based on appellant's criminal record. There is no evidence that appellant's criminal history subjected Sarah and Alison to a risk of harm. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

The court's findings of emotional harm were made under subdivision (b) of section 300, which applies when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ."[5] Appellant contends there is no substantial evidence that Sarah and Alison had suffered or were at substantial risk of suffering serious *physical* harm or illness as a result of emotional abuse.

We agree with appellant. No evidence was introduced showing that Sarah and Alison had suffered physical harm or illness as a result of appellant's emotional abuse. There also was no evidence introduced that they were at substantial risk of future physical harm or illness due to the effects of appellant's emotional abuse. This distinguishes the instant case from *In re Heather A.*, *supra*, 52 Cal.App.4th 183, in which there was evidence from an expert as to the type of injury to the children's physical

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[5] Subdivision (c) of section 300 applies when a child is suffering, or is at substantial risk of suffering, severe emotional damage. No allegations of severe emotional damage under subdivision (c) were made in the amended petition.

health that could result from their exposure to their parents' domestic violence and the psychological effect such exposure could have on them. (At pp. 195-196.)

In summary, the jurisdictional findings based on appellant's criminal history and emotional abuse of Sarah and Alison must be reversed as unsupported by substantial evidence. The findings based on appellant's physical abuse of the girls, and thus the jurisdictional order itself, still stand. The no visitation order may stand as well, although it now has been superseded by an order permitting monitored visitation.

The order is reversed as to the findings under paragraphs b-6 and b-7. In all other respects, the order is affirmed.

NOT TO BE PUBLISHED

SPENCER, P. J.

We concur:

VOGEL, J.

ROTHSCHILD, J.